

an intestacy should be sui juris and should consent to the matters being disposed of on motion.

1901

BRASSINGTON,  
IN THE  
GOODS OF.

GORELL BARNES J. I will allow probate of the will.

Solicitors: *Charles Richard Taylor; Pearce & Rowse.*

H. D. G.

### BROWN v. SKIRROW.

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Nov. 12, 13.

*Will—Execution—“In the Presence” of Witnesses—Wills Act, 1837 (1 Vict. c. 26), s. 9.*

The expression “in the presence” in s. 9 of the Wills Act must be taken to mean actual visual presence.

Where a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness:—

*Held*, that the testatrix did not sign “in the presence” of the second witness.

THE plaintiffs, as executors, propounded a will of their sister, Mrs. Harriet Ann Skirrow, dated July 20, 1900. This will was drawn by her solicitor and attested by him and his clerk.

The defendants, two infant children of the testatrix, appearing by their duly appointed guardian ad litem, pleaded revocation of that will and propounded a later will executed on April 22, 1901, but wrongly dated 1891, in which also the plaintiffs were named as executors.

In reply, the plaintiffs pleaded undue execution of the later will; and this was the sole issue contested in the case.

The husband of the deceased, who resided in Canada, had been cited, but had not appeared.

The following are the facts:—

On Monday, April 22, 1901, in the forenoon, the testatrix

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went to the shop of Mr. Sandy Read, at 225, Hyde Park Road, Leeds, grocer and wine merchant, which was near her residence. Both Mr. Read and Miss Mary Jeffery, his assistant, were in the shop, the former being engaged at the time with a commercial traveller, who was also in the shop and who stood between Mr. Read and the testatrix. The shop, which was not large, had two counters, and Mr. Read was at one counter. The testatrix went to Miss Jeffery, who was at the other counter, produced a printed form of will, which, apparently, had already been filled up, and asked Miss Jeffery to see her sign it. The testatrix signed it, and Miss Jeffery, who saw the testatrix sign, then attested it. The traveller having left shortly afterwards, Mr. Read was asked by Miss Jeffery to go round to the counter where the testatrix had signed, Miss Jeffery taking his place at the other counter. The testatrix then said to Mr. Read, "This is my will. I have signed it. Miss Jeffery has signed it. Will you sign it?" At this time Miss Jeffery was attending to a customer at the other counter, and did not see Mr. Read sign the will.

*Priestley*, for the defendants, asked the Court to find that this document was duly executed.

*Middleton*, for the plaintiffs, contra. One of the latest cases as to the meaning of the word "presence" in s. 9 of the Wills Act (1) is *Carter v. Seaton*. (2) There must be, on the part of a testator or testatrix, capacity to see the witnesses sign—that is, actual visual capacity.

The facts in the present case are very like those proved in *Wyatt v. Berry*. (3) The decision of Sir H. Jenner Fust in *Moore v. King* (4) is also strongly in favour of the plaintiffs in the present case. *Smith v. Smith* (5) is in point as to seeing the act of writing being necessary. *In the Goods of Kellick* (6) is an authority that "presence" means that the witnesses must see the testator sign, because that is the ground upon which the Court rejected the codicil. Mr. Read, one of the

(1) 1 Vict. c. 26.

(2) (1901) 17 Times L. R. 671.

(3) [1893] P. 5.

(4) (1842) 3 Curt. 243.

(5) (1866) L. R. 1 P. & M. 143.

(6) (1864) 34 L. J. (P. & M.) 2.

witnesses in the present case, not having seen, nor endeavoured to see, the testatrix sign the paper, was not "present."

[GORELL BARNES J. Can a blind person witness a will?]

That is a very different thing: a blind person might be quite close and might be told by the testator or testatrix that the document which was signed was a will, and, after such an acknowledgment, might attest it. In the present case no effort was made to enable the witness to see the signing of the will. Apart from the first point that "presence" must mean visual presence, there was, on the evidence, an interval of five minutes between the attestation by one witness and the attestation by the other, and, moreover, a space of ten feet with two human bodies interposed. These facts bring this case within *Wyatt v. Berry* (1) and *Hindmarsh v. Charlton* (2), and the decisions in those and similar cases therefore apply.

[GORELL BARNES J. *Hindmarsh v. Charlton* (2) was a case of non-acknowledgment in the presence of the two witnesses.]

The Wills Act says "present at the same time."

[GORELL BARNES J. All that it requires is that they should be present: not that they must both put their names to the document while they are there. I suppose one witness might sign, and then the other might sign afterwards.]

*Priestley*, for the defendants. The only element that may be said to be wanting in this case is that Mr. Read's attention was not drawn to the fact that the testatrix was going to sign the will. The strongest case in the defendants' favour is *Newton v. Clarke*. (3) The word "present" occurs in the Statute of Frauds (29 Car. 2, c. 3), s. 5.

[GORELL BARNES J. You cannot be a witness to an act that you are unconscious of; otherwise the thing might be done in a ball-room 100 feet long and with a number of people in the intervening space. In my view, at the end of the transaction, the witness should be able to say with truth, "I know that this testator or testatrix has signed this document."]

(1) [1893] P. 5.

(2) (1861) 8 H. L. C. 160.

(3) (1839) 2 Curt. 320.

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It is not necessary that the witness should have his attention drawn to what the testator is doing or should think about it. Mr. Read said he was conscious that the testatrix was present in the shop, and knew that she was doing something.

[GORELL BARNES J. He had not the slightest idea of what was going on at the other counter.]

The judge in *Newton v. Clarke* (1) goes on to refer to *Casson v. Dade* (2), where the doctrine of constructive presence was carried to its greatest length. There is no suggestion of acknowledgment in the present case: clearly there was no acknowledgment. The witnesses need not attest in the presence of each other: *Cooper v. Bockett*. (3)

GORELL BARNES J. The question in this case is which of these two wills is to stand. There is no doubt, from the evidence, that the first will, dated July 20, 1900, was duly executed and attested. The second will is dated April 22, 1891; but this is clearly a mistake for 1901. If it is a good will, it revokes the former one, though not in express terms. The sole question is, Was the second will validly executed?

It appears that the testatrix prepared the second will herself and then took it to a shop, a photograph of which was produced with a variety of groceries and other things shewn therein, and in particular two counters, one on the left and the other on the right hand side of the shop. The two witnesses, or people exceedingly like them, are shewn standing behind the respective counters. The testatrix appears to have proceeded straight to the left-hand counter, where Miss Jeffery was, and asked her to witness her will. She stood with her back towards the other counter, and behind her was a commercial traveller doing business with Mr. Read, the other witness in the case. It appears, as far as I understand the evidence, that the testatrix signed her name at the left-hand counter, over which Miss Jeffery was leaning, and then Miss Jeffery signed her name as it appears on the document. Up to this time Mr. Read had been engrossed with the commercial

(1) 2 Curt. 320.

(2) (1781) 1 Bro. C. C. 99.

(3) (1846) 4 No. Ca. 685.

traveller, and had not the slightest idea of what was going on at the other counter. It is urged that, even if he were conscious that the testatrix was there, he did not see anything of the transaction at the other counter; he says so himself. In fact, he did not know, and had no opportunity of knowing, what was going on there. The witness, Miss Jeffery, having completed her signature, marched round the shop and asked Mr. Read to come from his counter and go round to where the testatrix still was, Miss Jeffery taking up the position which Mr. Read vacated. Mr. Read accordingly went round, and the testatrix said to him, "This is my will." Mr. Read then signed his name to the document. The question for me to determine is whether that was a good execution and attestation. It is not suggested that it was a good acknowledgment in the presence of the two witnesses, because, at the moment when she said to Mr. Read "This is my will," the first witness, Miss Jeffery, had already signed her name; and, according to the decided cases, the acknowledgment must be made in the presence of the two witnesses, who must afterwards attest it: see especially *Wyatt v. Berry*. (1) Mr. Priestley, however, contends that it was a good execution; but I fail to see how the testatrix's signature can be said to have been affixed to the document in the presence of Mr. Read, when, although he was in the shop, he had no idea and saw nothing of what was going on at the time, and, moreover, had no opportunity of seeing, there being, as I have said, another person in the shop between him and the testatrix. In some cases it would be most unfortunate that such a result should arise; but, happily, in the present instance it is not very serious, because the earlier will is very much to the same effect as the later one. The Wills Act is very precise, and must be applied with strictness. I have long held the view that it would be a good thing if wills were required to be signed in the presence of some public official who should be able to see that they are properly executed. In the present state of things, I must hold that the later will is invalid, and I therefore pronounce against it. I grant probate of the earlier will,

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[Gorell Barnes J]

(1) [1893] P. 5.

1901 and I direct that the costs of both parties be paid out of the  
 BROWN estate.

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Solicitors for plaintiffs: *Chester & Co., for Craven & Clegg, Leeds.*

Solicitors for defendants: *Budd, Johnsons & Jecks.*

H. D. G.

1901  
 Nov. 19.

BILBY *v.* BILBY AND HARROP.

*Divorce—Practice—Costs—Co-respondent.*

Where, upon an application to make a co-respondent liable for the costs of a petition, the only proof of scienter was an admission by him that within a fortnight after he first committed adultery with the respondent he became aware that she was a married woman :—

*Held*, that the petitioner was entitled to an order for costs against the co-respondent.

THE petition of the husband for dissolution of marriage alleged that the respondent had frequently committed adultery with Thomas Harrop, the co-respondent; and that between May 20, 1901, and June 10, 1901, at an address stated, the respondent and co-respondent on divers occasions committed adultery.

It appeared that the respondent left her husband about the end of 1891 or beginning of 1892; that she called on him in 1899; and that subsequently he saw the co-respondent, who admitted adultery, but said that at the time when the guilty intimacy commenced he did not know that the respondent was a married woman.

The co-respondent made a similar statement to the petitioner's solicitor, adding that he first became aware a fortnight after he "took up" with her that she was married.

The suit was undefended. The co-respondent appeared to the citation, but filed no answer.

*Barnard*, for the petitioner, asked that the co-respondent should be condemned in costs.